

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

-----x  
KENNETH J. LECKY, et al :  
 :  
 :  
 Plaintiffs :  
 :  
 :  
 versus : Civil Action Number  
 :  
 VIRGINIA STATE BOARD : 1:17-CV-1336  
 of ELECTIONS, et al :  
 :  
 :  
 Defendants.:  
-----x

January 5, 2018

The above-entitled Motion for Preliminary  
Injunction was continued before the Honorable T.S. Ellis, III,  
United States District Judge.

THIS TRANSCRIPT REPRESENTS THE PRODUCT  
OF AN OFFICIAL REPORTER, ENGAGED BY THE  
COURT, WHO HAS PERSONALLY CERTIFIED THAT  
IT REPRESENTS TESTIMONY AND PROCEEDINGS OF  
THE CASE AS RECORDED.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

Bruce Spiva  
Brian Marshall  
Aria Christine Branch  
Perkins Coie LLP (DC)  
700 13th St NW  
Suite 600  
Washington, DC 20005-3690

FOR THE DEFENDANT: (G. Paul Nardo)

Joshua David Tully  
Emmet Flood  
Williams & Connolly LLP (DC)  
725 12th St NW  
Washington, DC 20005

FOR THE DEFENDANTS: (Doug Filler, Cathie Braman, Aaron Markel)

Michael Robert Ward  
McCandlish Holton Morris PC  
1111 E Main St  
PO Box 796  
Suite 2100  
Richmond, VA 23218-0796

FOR THE DEFENDANTS: (Gregory Riddlemoser, Marc Hoffmann, Marie Gozzi)

Michael Gordon Matheson  
Thompson McMullan PC  
100 Shockoe Slip  
3rd Fl  
Richmond, VA 23219-4140

FOR THE DEFENDANT: (Virginia State Board of Elections)

Anna Tillie Birkenheier  
Office of the Attorney General (Richmond)  
202 North 9th Street  
Richmond, VA 23219

1 APPEARANCES CONTINUED:

2 FOR THE DEFENDANT: (Robert M. Thomas, Jr.)

3 Trevor Marshall Stanley  
4 Patrick Lewis  
5 Baker & Hostetler LLP (DC)  
6 1050 Connecticut Ave NW  
7 Suite 1100  
8 Washington, DC 20036  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

19 OFFICIAL UNITED STATES COURT REPORTER:

20 MS. TONIA M. HARRIS, RPR  
21 United States District Court  
22 Eastern District of Virginia  
23 401 Courthouse Square  
24 Ninth Floor  
25 Alexandria, VA 22314  
703-646-1438

P R O C E E D I N G S

THE DEPUTY CLERK: Kenneth J. Lecky, et al. v.  
Virginia State Board of Elections, et al. Civil Case Number  
17-CV-1336.

Counsel, please come forward and identify yourself  
for the record.

THE COURT: All right. Who's here for the  
plaintiffs? Who is here on behalf of the plaintiffs, please.

MR. SPIVA: Your Honor, this is Bruce Spiva from  
Perkins Coie and with me is my colleagues, Aria Branch and  
Brian Marshall.

THE COURT: Who will argue today?

MR. SPIVA: I will, Your Honor.

THE COURT: All right, sir, would you spell your  
last name for the court reporter.

MR. SPIVA: Yes, Your Honor. It's Spiva, S, as in  
Sam; P, as in Paul; I; V, as in Victor; A.

THE COURT: All right. Mr. Spiva, good afternoon to  
you.

MR. SPIVA: Good afternoon, Your Honor.

THE COURT: Now there are a plethora of defendants.  
I didn't even count them all, but who is here today who  
expects to be heard?

MR. MATHESON: Good afternoon, Your Honor. My name

1 is Mike Matheson. I'm with the law firm Thompson McMullan. I  
2 represent Registrar Gregory Riddlemoser, Registrar, Marc  
3 Hoffmann.

4 THE COURT: All right. You've submitted a number of  
5 pleadings in this matter, briefs.

6 MR. MATHESON: Yes, Your Honor.

7 THE COURT: All right, so. Your last name, sir?

8 MR. MATHESON: Matheson.

9 THE COURT: Matheson. All right. You will speak.  
10 Who else wishes to be heard.

11 MR. STANLEY: Your Honor, my name is Trevor Stanley.  
12 I'm here on behalf of defendant Robert N. Thomas, Jr., an  
13 intervenor with the Republican Party of Virginia, Danielle J.  
14 Davis and Mark Cole.

15 Patrick Lewis, my colleague, will be speaking on  
16 behalf of the parties. His admission for pro hac vice is  
17 still pending before the Court.

18 THE COURT: I'm sure I've entered it by now. Did  
19 you pay the fee?

20 MR. STANLEY: Yes, Your Honor.

21 THE COURT: That's what matters.

22 What is your last name, again, Lewis?

23 MR. LEWIS: Yes, Your Honor, Lewis, L-E-W-I-S.

24 THE COURT: All right. Anyone else expects to be  
25 heard this afternoon on this motion for a preliminary

1 injunction?

2 MS. BIRKENHEIER: Your Honor, I am Anna Birkenheier  
3 and I'm here today on behalf of the governor of Virginia, the  
4 Virginia State Board of Elections and the individual members,  
5 the Department of Elections and the Commissioner of Elections,  
6 Edgardo Cortes.

7 THE COURT: So you have a lot of clients?

8 MS. BIRKENHEIER: Yes, Your Honor.

9 THE COURT: And you also hope to be heard today.

10 MS. BIRKENHEIER: Briefly, Your Honor.

11 THE COURT: You may be seated for a moment.

12 MR. TULLY: Your Honor.

13 THE COURT: Oh, someone else.

14 MR. TULLY: I just wanted to introduce myself.  
15 Joshua Tully from Williams and Connolly on behalf of G. Paul  
16 Nardo, the Clerk of the Virginia House of Delegates. I would  
17 like to introduce my colleague, Emmet Flood, who is admitted  
18 pro hac vice. We don't expect to be heard unless the Court  
19 needs to hear from us.

20 THE COURT: And whom do you represent?

21 MR. TULLY: The clerk of the Virginia House of  
22 Delegates.

23 THE COURT: All right. And you haven't filed  
24 anything, have you?

25 MR. TULLY: We have.

1 THE COURT: You have.

2 There's been so much paper I would expect to see a  
3 map of the western United States that shows that it's been  
4 blighted by this case. Anyway you may be seated for a moment.  
5 You'll forget -- I apologize for the delay. And I know there  
6 are a lot of people here who came earlier, but there were  
7 other things I had to do. I apologize to all of you for the  
8 delay. Let me tell you what I intend to do.

9 MR. WARD: Your Honor, there's also myself, Michael  
10 Ward, counsel for Doug Filler, Cathie and Aaron Markel.

11 THE COURT: Counsel for whom?

12 MR. WARD: Doug Filler, Cathie, and Aaron Markel,  
13 they are electoral board members.

14 THE COURT: All right. Do you wish to be heard  
15 today?

16 MR. WARD: Your Honor, to the extent that something  
17 arises I may be needed to be heard. I'm not expecting to.

18 THE COURT: What I intend to do is take a brief,  
19 brief recess. Five minutes. No more. Mostly to replenish my  
20 water. And then I will hear from the plaintiffs on their  
21 motion for a preliminary injunction. And then I will hear  
22 from those defendants who wish to be heard.

23 I'm going to do it this way. I am, not  
24 surprisingly, not unfamiliar with this case, not unfamiliar  
25 with the facts and I'm not unfamiliar with the large number of

1 pleadings that have been filed. And I know there are lots of  
2 people interested in it. But there are lots of people  
3 interested in many cases. And even if there are only a few  
4 people interested, it certainly is important to the people,  
5 the few who are. Witness the last litigant. So I have paid  
6 careful attention to your submissions, including one  
7 yesterday, if not last night. I can't remember which, but  
8 there's a very, very recent filing that I'm familiar with. So  
9 what I intend to do is to give the plaintiffs an unfettered  
10 opportunity. I know the facts, I know the contentions. I  
11 would be very surprised if you say anything striking or new,  
12 but I'm going to give you the opportunity to say anything  
13 striking or new. The only difference being that it's only  
14 going to be 15 or 20 minutes. If you can't do it in 15 or 20  
15 minutes, and in the -- the 100-some pages that I've already  
16 seen, then it can't be done.

17           And then, I'll give you each a somewhat briefer  
18 opportunity to be heard on matters. But as I said, I am  
19 familiar with the facts and the parties' contentions in this  
20 case. And that's how I intend to proceed.

21           I'll take another very brief recess and then we'll  
22 proceed in this case. Court stands in recess.

23           (Recess.)

24           THE COURT: All right. Who will be heard from the  
25 plaintiffs?

1 MR. SPIVA: I will, Your Honor. Bruce Spiva.

2 THE COURT: All right, Mr. Spiva. You may proceed.

3 MR. SPIVA: Thank you, Your Honor. Before I start,  
4 would it be possible for me to reserve like five minutes for a  
5 rebuttal?

6 THE COURT: You don't have to do it that formally,  
7 but I'll give you an opportunity to respond briefly.

8 MR. SPIVA: Okay. Thank you, Your Honor. And Your  
9 Honor, the historic 2017 Virginia House of Delegates election  
10 hopefully --

11 THE COURT: All elections are historic.

12 MR. SPIVA: Yes, well, this one may be more  
13 historic, Your Honor, than others that hopefully will forever  
14 put to rest the old saying that "every vote counts."

15 In this race, for HD-28, which is obviously the  
16 subject of this lawsuit, as Your Honor knows, the certified  
17 election results show a difference between the Republican  
18 candidate, Robert Thomas, and the Democratic candidate, Joshua  
19 Cole of 73 votes. And what we now know, Your Honor, which I  
20 don't believe was at least fully in the record at the time of  
21 the TRO proceeding from the report of the Department of  
22 Elections, which is attached to the declaration of Edgardo  
23 Cortes, is that on election day a total of at least 147  
24 people, over twice the difference, were either denied their  
25 right to vote in HD-28 or were permitted to vote in HD-28 even

1    though they had no such right.  And that's why we're here,  
2    Your Honor.  86 voters were not, who live in HD-28.  And  
3    there's no dispute that they have a constitutional right to  
4    vote -- right to vote, for their House of Delegates  
5    representatives, were not allowed to vote.  And in addition,  
6    61 voters who live outside the district were permitted to vote  
7    in HD-28, thereby diluting the votes of the rest of the HD-28  
8    voters.

9               None of these undisputed differences, Your Honor,  
10   were due to poll worker error.  The current margin, as I  
11   mentioned, is less than half of the number of the affected  
12   voters.  And so what this means is that we cannot reliably  
13   know whether the registered voters of HD-28, who exercised  
14   their constitutional right to vote in the November election,  
15   preferred Robert Thomas or Joshua Cole.  And because of secret  
16   balloting there's no way for us to know that.

17              The City of Fredricksburg knew about the problems of  
18   voters being misassigned between HD-28 and HD-88 for more than  
19   two years and yet the problem was not fixed.  When the most  
20   powerful person in the Virginia legislature, at the time  
21   Speaker Howell raised the concern for officials in the -- in  
22   2015, efforts were made to solve the problem right away.  Even  
23   though absentee balloting for his primary election had already  
24   begun.  When plaintiff here, Ms. D.D. Lecky, and other voters  
25   raised the concern on election day in 2017, City officials

1 responded by removing the map from the polling place that  
2 would have allowed other voters to discover the error.

3           Following -- Your Honor, there was a possible remedy  
4 at hand when they learned about this on election day and that  
5 would have been to follow the Virginia code and provide voters  
6 who believed that they in fact knew, according to the map that  
7 was on the wall in the precinct, that they were in HD-28 to  
8 vote a provisional ballot until it could be straightened out.  
9 After the election, if it turned out they, in fact, weren't  
10 residents of HD-28, the vote could have not been counted and  
11 if, as was the case with the 87 voters, they actually proved  
12 to be residents, it could be counted.

13           But instead of using this statutorily prescribed  
14 remedy to ensure that preelection administrative errors did  
15 not result in disenfranchisement, the electoral board decided  
16 the postelection remedy, which was -- wasn't and isn't  
17 available to these voters, would be sufficient for any voter  
18 affected by these errors.

19           So that's why we are here now. The pre-election  
20 acts of officials disenfranchised these voters and diluted the  
21 votes of the other HD-28 residents. And in Fredericksburg, at  
22 least, the board denied these voters a remedy on election day.

23           Now the only remedy left to cure the constitutional  
24 harm is a new election. And the only body with the authority  
25 to order that new election, the only institution, Your Honor,

1 is this court.

2 THE COURT: That didn't have to be true.

3 MR. SPIVA: Well, for these voters --

4 THE COURT: The answer is, it didn't have to be that  
5 way. It could have been remedied by the General Assembly.

6 MR. SPIVA: The candidate --

7 THE COURT: Is the answer to that yes or no?

8 MR. SPIVA: Theoretically, Your Honor, yes.

9 THE COURT: What do you mean "theoretically"?

10 This losing candidate could have instituted  
11 proceedings to have the General Assembly address this issue.

12 MR. SPIVA: The losing candidate.

13 THE COURT: Yes or no.

14 MR. SPIVA: Yes, the losing candidate, who is not  
15 before the Court, could have brought a contest, Your Honor.

16 THE COURT: All right. In fact, what happened here  
17 is that this losing candidate after a recount decided not to.

18 MR. SPIVA: That is -- that's accurate, Your Honor.

19 THE COURT: The reason for that may be that it  
20 either didn't expect any remedy from the General Assembly and  
21 it also knew that if proceeded in that way, that it might  
22 disincline the Court to issue a remedy in view of the state.  
23 That's why you did it that way.

24 MR. SPIVA: It wasn't me, Your Honor. The candidate  
25 decided not to pursue a contest.

1 THE COURT: So you all weren't in touch with the  
2 candidate at all?

3 MR. SPIVA: I'm sorry, Your Honor.

4 THE COURT: You all weren't in touch with the  
5 candidate at all?

6 MR. SPIVA: When you say "you all" you mean my law  
7 firm, Your Honor?

8 THE COURT: Your parties and your law firm.

9 MR. SPIVA: Well, the parties here today are three  
10 voters --

11 THE COURT: Just give me an answer, please. It's  
12 late. Were you all in touch with this losing candidate?

13 MR. SPIVA: The parties here were not, Your Honor.  
14 The -- the, the -- I mean my law firm represented the  
15 candidate in the --

16 THE COURT: Never mind. It's not material to my  
17 decision tonight, but remember in the future if I ask a  
18 question, answer it directly. We don't have time to play  
19 lawyers' games. Proceed.

20 MR. SPIVA: Okay, Your Honor.

21 Here the problem is so severe that the Government  
22 officials that have institutional interest in resisting  
23 federal court intervention, the state defendants, including  
24 the bipartisan State Board of Elections and even some local  
25 electoral board members believe that it is warranted in these

1 extreme circumstances.

2           Your Honor, there's a high likelihood of success on  
3 the merits in this case. And I won't repeat what's in the  
4 briefs. I think I just want to emphasize our substantive due  
5 process claim and highlight the cases. I know Your Honor is  
6 familiar with them and dealt with some of these in your TRO  
7 ruling, but I would like to take an opportunity to try to  
8 convince you to see the cases the way that we view them.  
9 Starting with *Griffin v. Burns*, the First Circuit case, there  
10 the Court announced the standard that broad gauged in  
11 unfairness that permeates an election, even if derived from  
12 apparently neutral action, can make out a due process, a  
13 substantive due process claim. And that standard, Your Honor,  
14 has been adopted by the Fourth Circuit. Quoted with approval  
15 by the Fourth Circuit in *Hutchinson* and in *Hendon*. In that  
16 case, Your Honor, the election officials believed that they  
17 were doing the correct thing, the legal thing, the right  
18 thing. They gave out, as Your Honor knows, absentee ballots  
19 to people in a primary race.

20           Later the Supreme Court of that state determined,  
21 with some dissents, I might note, that under state law that  
22 wasn't permissible in a primary. And so the Court, the  
23 federal court, stepped in and said there's no question that  
24 the election officials that gave out these ballots weren't  
25 trying to deprive anybody of their right to vote, but that

1 this would work a fundamental unfairness to then strike all of  
2 these people's absentee ballots. And I would submit, Your  
3 Honor, that that's very akin to what happened here. I mean we  
4 have said in our briefs and I alluded to this in my opening  
5 with the facts, there certainly was every reason why the --  
6 this should have been discovered before election day. There  
7 were warning signs that were given to the Fredericksburg  
8 Electoral Board that they all also shared with the State Board  
9 of Elections and the Department of Elections. And there was  
10 never any kind of procedure to really check to see, despite  
11 the fact that they knew that there had been misassignments.

12           So I think, even if there were a requirement of  
13 showing intent, that can be met here, but the point I want to  
14 make is, is that *Griffin* is a case that basic -- that has been  
15 adopted by the circuit that basically says the type of intent  
16 that is required is not, you know, an intent to deprive people  
17 of the right to vote. It's just this broad-gauged unfairness  
18 that permeates an election.

19           Similarly *Ury v. Santee*, which I know Your Honor is  
20 also familiar with, is a long lines case, where the electoral  
21 board in that case took an action or the council, the city  
22 council, to reduce the number of precincts available. And  
23 that resulted in untenable lines on election day. That  
24 resulted in many people not being able to exercise their right  
25 to vote. But the Court made an explicit finding, Your Honor,

1 in that case that the Board did not intend to deprive anyone  
2 the right to vote. They reduced the number of precincts to  
3 save money. It was reckless because there were -- there were  
4 warning signs that they -- that the number of precincts they  
5 were going to use was going to be insufficient. They weren't  
6 careful enough. Again, very analogous, I think, to what  
7 happened here. Warning signs ignored. And then inadequate  
8 attempts to remedy the problem on the day of the election.

9           The -- you know here Ms. Lecky, you know, alerted,  
10 came in and voted at nine a.m. in her precinct, and alerted  
11 election officials right away that she -- before she voted she  
12 alerted them that she thought she had the wrong ballot. After  
13 she voted, she went and she talked to two members of the  
14 electoral board and alerted them and actually took them to a  
15 map -- and this is all in the record, in the declarations,  
16 Your Honor -- and showed them that her street was well within  
17 the district. They consulted with the State Board.  
18 Ultimately the election officials and Fredericksburg's  
19 decision was to not provide her with a provisional ballot and  
20 instead of taking the map as a sign that maybe we should  
21 investigate further here and maybe take further action, they  
22 took the map down. The map was right. And the information in  
23 the state system that created this broad-gauged unfairness,  
24 Your Honor, that was incorrect. And a little bit more  
25 investigation would have found that out. Very similar to what

1 happened in *Ury*.

2 And finally, Your Honor I would just like to  
3 highlight *Krieger v. City of Peoria*, which is not Peoria,  
4 Illinois, but I take it Peoria, Arizona, a 2014 case, where --  
5 which we also cite in our briefs. But there it was not only  
6 purely a mistake that created the type of broad-gauged  
7 unfairness that resulted in a new election being called, but  
8 the mistake, according to the findings of the Court there,  
9 wasn't even the mistake of the election officials, it was of a  
10 printing company that they had engaged. And twice they sent  
11 out absentee ballots with the wrong -- without one of the  
12 candidate's names on it. And basically they said there's no  
13 way we can cure this at this point, now that so many ballots  
14 have gone out and so much time has passed.

15 The only way to allow the voters to exercise their  
16 right to choose this particular candidate, whose name was left  
17 off, is to have a new election. Again, no finding of intent.  
18 In fact, quite the opposite. The election official was found  
19 to not to be at fault at all, but it was so fundamentally  
20 unfair that the Court said that the voters had to have another  
21 shot at it.

22 Your Honor, we, I think, explain our other legal  
23 theories in our briefs. I won't go over that now. I think I  
24 do want to take just a moment to address a couple of the  
25 cases, not all, but a couple of the cases that the defendants

1 -- not the defendants, but intervenors cite in their brief.

2           *Hutchinson v. Miller*, the Fourth Circuit case, again  
3 it's a case that acknowledges that federal courts adjudicate  
4 and have a role in adjudicating constitutional claims that  
5 involve broad-gauged unfairness and basically cites to the  
6 test that I mentioned a minute ago in *Griffin*.

7           Really *Hutchinson v. Miller* is really about whether  
8 damages are available in a jury trial for alleged election  
9 irregularities. And ones that were brought long after the  
10 election in question. Really has, I think, other than the  
11 fact that it adopts *Griffin* or cites *Hendon* that -- adopting  
12 *Griffin*, really has little relevance beyond that, I think, to  
13 this case.

14           *Hendon v. North Carolina State Board of Elections*  
15 also adopts the *Griffin* language. There the issue of intent  
16 that was -- that came up there involved very particular  
17 failures to print ballots properly. The font on the ballot  
18 and alleged failures and whether the size of the type was  
19 right. And essentially there the Court said, you know, those  
20 are not the types of minute election administration issues  
21 that we, as a federal court, properly will get into.

22           And what's more is that it did not lay down, Your  
23 Honor, I would argue, a bright line rule that intent is  
24 required to make out a due process claim. It basically listed  
25 that as one of the factors to consider. The severity of the

1 deprivation, whether the deprivation was intentional or more  
2 of a negligent failure to carry out state procedures and  
3 whether it erodes the democratic process.

4 Your Honor, I think I will reserve the rest of -- of  
5 my time for rebuttal unless Your Honor has further questions  
6 for me.

7 THE COURT: That's fine. Your rebuttal is still  
8 going to be about five minutes.

9 MR. SPIVA: That's okay, Your Honor. Thank you.

10 THE COURT: All right. Tell me again who you are  
11 and who your client is as each of you who want to speak, you  
12 may do so.

13 MR. LEWIS: Your Honor, thank you very much. My  
14 name is Patrick Lewis. I'm here on behalf of Intervenor, Bob  
15 Thomas, as well as the affiliated intervenors.

16 THE COURT: Who are all they?

17 MR. LEWIS: The Republican Party of Virginia,  
18 Danielle J. Davis and Mark L. Cole.

19 THE COURT: That's enough.

20 MR. LEWIS: Thank you, Your Honor.

21 THE COURT: When you gave me a name, I had no idea  
22 -- I don't remember all the names. There must be 30 names.  
23 Go on.

24 MR. LEWIS: Your Honor, I do have a cheat sheet.  
25 It's --

1 THE COURT: You do have a what?

2 MR. LEWIS: A cheat sheet, Your Honor.

3 THE COURT: Oh, cheat sheet.

4 MR. LEWIS: There are a lot of names. You're  
5 correct.

6 Your Honor, this case is fundamentally no different  
7 today than it was on November 22nd when this Court held its  
8 TRO hearing. At that point the allegation was that --

9 THE COURT: Well, the numbers have been refined.

10 MR. LEWIS: Your Honor, yes, they absolutely have.  
11 The allegation was somewhere between 80 and 668 voters as of  
12 November 22nd. The number appears now to be 147.

13 In terms of an order of magnitude, it really is --  
14 is not materially different. My understanding is that between  
15 Stafford County and the City of Fredericksburg, there are  
16 108,000 registered voters. Of that 108,000 registered voters,  
17 give or take, we're talking about 147 voters who it is alleged  
18 received an incorrect ballot. Either it received a ballot for  
19 House District 28 and it should have received a ballot for a  
20 different House District or received that -- or were not given  
21 a ballot for House District 28 and should have been. It is  
22 unclear to me, as I stand here today, what that final number  
23 is. I'm aware that the Virginia Election Board has performed  
24 an analysis. There's a copy of that in the record. You know  
25 that remains to be seen. We may never know the answer. The

1 other candidate in the race, Mr. Cole, declined to commence a  
2 contest, as was his right, under the Virginia state law. And  
3 that was a significant remedy that he should have pursued and  
4 didn't.

5 Today, as of November 22nd, we are still talking a  
6 garden-variety election concern or election irregularity, to  
7 use the language in the case law. There is no, under *Griffin*,  
8 we're looking for to invalidate an election, we're looking for  
9 broad-gauged unfairness, we're looking for a policy, we're  
10 looking for a procedure, we're looking for a systemic error, a  
11 systemic problem. That problem is not present in this case.  
12 The procedure in question is the -- is the voter presents  
13 himself or herself to the polling place. And is -- their name  
14 is checked on the books and they're handed a ballot. That's  
15 the procedure. There's nothing wrong with that procedure.

16 What we're talking about and my colleague, Mr.  
17 Matheson, and his clients put the -- have spoken to this in  
18 their brief, as the subject matter experts on the  
19 administration of this election. What we're fundamentally  
20 talking about here are random chance errors. We're talking  
21 about one off, essentially coding errors, where specific  
22 voters, maybe they should have been assigned in one district  
23 and for, you know, or due to an error by essentially clerical  
24 error were placed in a different district.

25 Again, we don't know the extent of the issues as we

1 stand here today, but every single number that we've been  
2 given is on a tiny scale compared to the number of registered  
3 voters in the relevant voting jurisdictions. 147 out of over  
4 100,000 voters, you know, we're dealing with a tiny fraction  
5 of a percent.

6 This is not analogous, in any respect, to some of  
7 the cases that plaintiffs cite in their brief. You know, they  
8 cite *Griffin* where you have the state Supreme Court  
9 retroactively invalidating 10 percent of the ballots that were  
10 cast, based on a decision, a policy, of the Rhode Island  
11 Secretary of State, to permit the use of these absentee and  
12 shut-in ballots in a primary election.

13 Plaintiffs' counsel spoke about the *Krieger* case in  
14 the district of Arizona in 2014. Another great example. In  
15 that case, the problem was that the primary -- the absentee  
16 ballot, 87 percent of the ballots in this particular election  
17 for city council in Arizona were cast absentee. The ballots  
18 were printed with only two out of three of the names of the  
19 qualified candidates for the Office of City Council.

20 Upon discovering the error, a second round of  
21 ballots were printed. Those ballots too, inexplicably,  
22 omitted the name of the third candidate, leading to yet a  
23 third set of ballots being printed and delivered. Here the  
24 broad-gauged unfairness was the remedy that the electoral  
25 board in that case had prescribed, which was if the original

1 ballots, that first and second round ballot, was returned, it  
2 would be counted. And in fact those ballots were flying in as  
3 the third round of ballots were going out. And so the result  
4 is that many, many, many ballots were being cast perhaps by  
5 voters who had no idea that the third candidate was on the  
6 ballot.

7 Here again, you have a single point source of a  
8 problem. You have a -- that permeates the election and calls  
9 the fundamental unfairness of the election into account. Not  
10 the case in this matter.

11 When you look at *Bennett*, another case in the Ninth  
12 Circuit, cited by plaintiffs, that case actually speaks very  
13 eloquently to one of plaintiffs other arguments, which is this  
14 concept that the number of potentially affected votes exceeds  
15 the margin of victory for Delegate Elect Thomas and as a  
16 result, you know, the ballots should be thrown out.

17 And here the key lesson from this case, at least to  
18 my mind, is a -- the federal fundamental right to vote is not  
19 implicated by these garden-variety election errors. And  
20 *Bennett* even talks about how a garden-variety election  
21 irregularity generally does not violate the due process  
22 clause, even if it affects the outcome.

23 In our papers, Your Honor, we cite to *Gamza*, to  
24 *Powell*, to *Harris County*, all of which also stands for that  
25 proposition. And this makes a lot of sense. The right to

1 vote is a personal right. It's a fundamental right, but it's  
2 also a personal right. A lot of reasons that people vote.  
3 And whether or not a ballot is counted correctly or if there's  
4 some clerical error that results in somebody getting a ballot  
5 in HD-88 when they should have had it in HD-28, the proper  
6 analysis is directed at the -- the source of the problem and  
7 the scope of the problem. It's not looking at 100 ballots  
8 were potentially affected in a race that was decided by 75  
9 votes versus 150 votes. The proper analysis, again, is the  
10 scope of the problem and here the scope of problem is tiny.

11 Others I know on our side can speak to some of the  
12 facts, but I've reviewed the e-mail traffic that was attached  
13 to plaintiffs various pleadings, all I saw were specific  
14 questions about specific voters and an electoral board that  
15 made prompt efforts to remediate any problems that arose. But  
16 no sign along the way of a systemic problem.

17 Speaking to another one of plaintiffs' cases, Your  
18 Honor, the *Ury* case, we would really note that case is very --  
19 is distinguishable from our case as well. In that instance,  
20 you add an election, Your Honor, where you had 32 precincts,  
21 voting precincts, that were shrunk to six. Inadequate voting  
22 machines, unequal counts of voters and were the result that  
23 hundreds, I believe it was 397 voters, signed affidavits  
24 stating that the lines were so long that they were turned  
25 away. Significant lines, significant problems, traffic

1 backups. All sorts of chaos on election day in that matter.

2 None of which has been alleged here, let alone proven.

3           The last point that we would like to raise for  
4 certainly on Mr. Thomas's behalf is whatever the ultimate  
5 outcome of this litigation is, and we believe that a cause of  
6 action has not been even viably stated. I know our motion to  
7 dismiss has already been filed in this case, but certainly the  
8 voters of the 28th House District are entitled to have their  
9 duly elected representative be seated next week. You know,  
10 even if there's a -- a special election that down the road  
11 needs to be called by one -- whether through this court or  
12 through some other proceeding, it would seem a very  
13 significant intrusion certainly for the voters and for the --  
14 and for the Virginia legislature to say that a duly-elected  
15 representative cannot be seated. You know, at least pending  
16 the outcome of any proceedings. So on that particular point,  
17 we would especially urge the Court to not grant the  
18 preliminary injunction and to allow Mr. Thomas to be seated  
19 next week.

20           THE COURT: Who's next?

21           MR. MATHESON: May it please the Court. My name is  
22 Mike Matheson. I represent five of the Local Election  
23 Officials in this case. Both registrars, Mr. Riddlemoser and  
24 Mr. Hoffman. Rene Rodriguez, who's the chairman of the  
25 Fredericksburg City Electoral Board, as well as Marie Gozzi,

1 who is the vice chair of the Stafford County Electoral Board,  
2 and Gloria Chittum, who's the secretary of the Stafford Board.

3 THE COURT: You do need a cheat sheet.

4 MR. MATHESON: Well, Your Honor, this is the third  
5 lawsuit that relates to the same election that I've  
6 represented some or all of these folks in, so I'm getting  
7 quite familiar with these names after --

8 THE COURT: This same election?

9 MR. MATHESON: Yes, Your Honor. Yes, Your Honor.

10 THE COURT: This same dispute?

11 MR. MATHESON: Well, not related to the provisional  
12 ballots, but we've been in front of Judge Hilton related to  
13 provisional ballots, or excuse me, absentee ballots, and we  
14 had another lawsuit related to provisional ballots. And so  
15 it's -- it's been --

16 THE COURT: But not lawsuits relating to this  
17 election between HD-28 and 88?

18 MR. MATHESON: Yes, Your Honor.

19 THE COURT: They are related to it?

20 MR. MATHESON: Well, yeah, none of them are pending,  
21 but, yes. So, Your Honor, here's my --

22 THE COURT: I'm sorry. I missed that. You say  
23 there are no pending lawsuits --

24 MR. MATHESON: Not pending.

25 THE COURT: -- related to this dispute?

1 MR. MATHESON: They've all been dismissed, but not  
2 pending.

3 THE COURT: All right. Thank you.

4 MR. MATHESON: So Your Honor, here is my chief  
5 concern. I know that the Court has a lot of people who want  
6 to be heard from today and I want to make the most studious  
7 use of my time and the Court's time. And my biggest concern,  
8 my agenda up here right now is that from the amended complaint  
9 to the motion for a preliminary injunction that gets filed in  
10 this case, there is a factual narrative that essentially  
11 starts on election day in 2017 and ends with the Cortes report  
12 that identifies all of these voters that should have cast  
13 votes in different races.

14 The reply brief in this case from the plaintiffs is  
15 filed on December 29th, and the Court in -- and that is  
16 essentially a do-over brief. The Court is presented with a  
17 brand new factual narrative and there are allegations related  
18 to things in 2015 that are made in those briefs that -- where  
19 they're trying to show that this is some kind of a  
20 long-standing problem that has existed. Not only were there  
21 almost 80 pages of documents filed with that reply brief, but  
22 then last night, after regular business hours, we have a whole  
23 nother batch of documents related to all of this stuff in 2015  
24 that were filed.

25 THE COURT: Let me say something about that.

1 MR. MATHESON: Yes, Your Honor.

2 THE COURT: I don't sanction. Well, let me use a  
3 different word. I don't invite or approve of last minute  
4 filings. This case is a little unusual because there wasn't a  
5 schedule. But lawyers have the notion -- some lawyers who  
6 practice, what I call BFA law, brute, force, and awkwardness.  
7 They file stuff whenever they want to and whenever they think  
8 it might help their cause. It doesn't help me. It irritates  
9 me. And it's unfair to the other side. But I understand how  
10 important people feel this is and why they do what they do.  
11 But they also need to understand that that isn't the way you  
12 do things.

13 MR. MATHESON: And I appreciate that. And Your  
14 Honor, I don't mean for this to sound like an ad hominem  
15 attack on my opponents, because I do understand they're trying  
16 to advocate for their position and there's been a lot of  
17 documents that have been coming in --

18 THE COURT: I don't allow people to keep filing  
19 stuff.

20 MR. MATHESON: I understand. But this is my  
21 concern. My concern is A, that all this 2015 stuff that's  
22 been injected into the record that we really haven't had a  
23 fair opportunity to respond to is somehow either going to  
24 color this Court's analysis in a way that is unwarranted or in  
25 the event that this matter gets appealed, that there's going

1 to be a factual record in this case that may look unfavorable  
2 to my clients.

3 So what I would like to do right now and I know the  
4 Court is going to have very limited patience, there's a couple  
5 of documents that I want to hand up. And I want to talk  
6 about --

7 THE COURT: So you want to do it too?

8 MR. MATHESON: I do, Your Honor and I --

9 THE COURT: That's fair play.

10 MR. MATHESON: I brought a couple of witnesses today  
11 and I know that Your Honor doesn't want to hear from  
12 witnesses, but I would like to proffer a couple of things and  
13 here is where I'm going with all of this.

14 THE COURT: Do so, but do it quickly, please.

15 MR. MATHESON: This 2015 stuff has nothing to do  
16 with the issue in this case. It demonstrably has nothing to  
17 do with the issues in this case. And so in order to do that,  
18 I need to do two things: Number one, I want to show the Court  
19 there are street files in VERIS. And I talked about this in  
20 my brief. And the Cortes report identifies specific address  
21 locations that were affected by this. There are street files  
22 in VERIS. And I'm going to hand the Court an exhibit that  
23 Registrar Riddlemoser put together for me that gives you a  
24 summary of what those street files are. And then I want to  
25 talk about Speaker Howell in 2015. Because I have a copy of

1 Speaker Howell's complaint. And I can show you that Speaker  
2 Howell's complaint had absolutely nothing to do with the  
3 voters who were impacted by what happened here.

4 So if I may, Your Honor, I want to hand an exhibit  
5 and I have copies -- I have eight copies which I think will  
6 give every camp their own copy of the document. If I can hand  
7 this to Your Honor. And I'm also going to pass up the  
8 communication from Speaker Howell from 2015.

9 THE COURT: All right. Go on.

10 MR. MATHESON: And let me tell you what we're  
11 looking at. So this report -- this table right here has got  
12 the street and address range numbers that the Cortes report  
13 identifies as having been misassigned during the 2017 election  
14 cycle. And Mr. Riddlemoser, to his credit, has done a bunch  
15 of work here. He actually went and tried to figure how many  
16 voters were affected versus how many actually voted. His  
17 number, as it turns out, is even bigger than Mr. Cortes'. He  
18 found that there are 150 voters who were affected rather than  
19 147. So there's a margin of error with this process too.  
20 That's a digression.

21 Here is the important part. So we have this e-mail  
22 chain from Speaker Howell and Speaker Howell's contention is  
23 that 201 is listed in the Code of Virginia as being in House  
24 District 28, but Fredericksburg city is treating it as a split  
25 precinct. So he has an attachment to this that starts on

1 State Board of Elections page 1004. And I literally got this  
2 two days ago. He has an attachment to this, and the  
3 attachment includes a list of every voter that he claims has  
4 been affected by a misassignment to a district in House  
5 District 201. And I'll let the plaintiffs fact check me on  
6 that. And I'll cut to the chase and tell you what you're  
7 going to find. If you go through this and you look at every  
8 single one of these addresses in this packet, there is not one  
9 address that was identified by Commissioner Cortes in his  
10 report.

11 So this -- what has been represented is that -- and  
12 the plaintiffs -- I'm not saying there's any nefarious  
13 misrepresentation here -- I just don't think that they  
14 understand. When Howell was complaining back in 2015, he was  
15 talking about something that's completely different than the  
16 issues that affected voters in this election.

17 Now here is what he was talking about. He was  
18 talking about a discrepancy between the Code of Virginia which  
19 defines the precincts in Fredericksburg city versus the  
20 precincts as they exist in Fredericksburg city. So recall in  
21 my brief I said that there is redistricting -- following  
22 redistricting, that the localities sometimes need to adjust  
23 their precinct boundaries so that their local elections  
24 conform to constitutional and state requirements.  
25 Fredericksburg did that in November of 2011. When

1 Fredericksburg did that, they had historically had one split  
2 precinct. Well, as a result of the 2011 ordinance, they had  
3 three split precincts. This has been a source of  
4 consternation in Fredericksburg city for years and years and  
5 years. And Howell was confused about this in 2015. He  
6 thought that 201 should not have been split and it turns out  
7 that he was looking at the wrong source of law.

8           And in 2016 this issue came up again. And so  
9 there's an e-mail that has been submitted by the plaintiffs  
10 from Brooks Braun in which Mr. Braun says sorry this took so  
11 long but you will be relieved to hear that everything is a-ok.  
12 And this has been represented as a statement that somehow  
13 misassignments or incorrect street files for voters as between  
14 28 and 88 had been corrected, but demonstrably that's not what  
15 this document says. What Mr. Braun is saying is, this  
16 explains the difference between the code language and the  
17 current maps. It also explains why you would have three  
18 splits in elections since 2011 and why that is perfectly fine.  
19 He's not talking about street files being incorrect. Mr.  
20 Braun is talking about the confusion in the complaints that  
21 they're receiving due to discrepancies existing between the  
22 code as it was passed in March of 2011 and the ordinance that  
23 adjusted those precinct boundaries in November of 2011.

24           The upshot of all of this, Your Honor, is that  
25 this argument that this is some kind of a known problem that

1 goes back two years is simply not correct. It's not correct.

2           There's a second argument that's raised in the  
3 reply brief and that is a new suggestion that somehow the  
4 election officials in Fredericksburg city should have handed  
5 out provisional ballots to all the voters at the VFW in  
6 precinct 402 on election day.

7           Well, Your Honor, and there is -- and there's an  
8 e-mail from Kathleen Dooley, who is the city attorney. I'm  
9 not sure how the plaintiffs got ahold of it. It seems like  
10 it's privileged to me, but it's been disseminated by third  
11 parties. And I don't have any control over that. But this  
12 e-mail is really interesting because what it demonstrates is,  
13 A, that precinct 402 is the only thing that is on  
14 Fredericksburg city's radar as a result of D.D. Lecky's  
15 complaint at the polling location.

16           If you go to the Riddlemoser report and you look  
17 at these street files, the misassignments not only happen in  
18 402, but they also happen in 201 which nobody was thinking  
19 about that on election day. And then above that you have  
20 Stafford County 302, Stafford County 203, Stafford County 402,  
21 Stafford County 103, 702, 703. The vast majority of these  
22 votes. Even if the Court were prepared to find that something  
23 more should have been done with respect to the VFW,  
24 approximately two-thirds of the votes that are even at issue  
25 in this case, was something that nobody had any idea existed

1 until two weeks after the election when Mr. Cortes issued the  
2 Cortes report.

3 And so what is the remedy there? They're saying  
4 hand out provisional ballots. Well, number one, we had no way  
5 of pinpointing every single voter that was affected by this,  
6 identifying that person when they walked in to hand them a  
7 provisional ballot. That's one problem.

8 So the only thing that we could have done  
9 provisionally would have been to hand out a provisional ballot  
10 to all 1,954 voters who walked through the door, which is a  
11 nightmare. There were 36 provisional ballots in  
12 Fredericksburg city. They would have had to canvass all 2,000  
13 of those within seven days after the election.

14 But the bigger problem is -- and this is exactly  
15 what the Dooley e-mail says, "There is no authority in the  
16 Code of Virginia for casting a provisional ballot based on an  
17 error in the street file or a -- an erroneous House District  
18 designation in VERIS." And if the plaintiffs disagree with  
19 me, I challenge them to tell me where in the Code of Virginia  
20 it says that you can cast a provisional ballot under that  
21 circumstance. So had we provisionally balloted all 1,954 of  
22 those people, we probably would have a bigger problem on our  
23 hand than we did -- than we do right now. We would have a  
24 1,954 voter problem on our hand instead of a 150 voter  
25 problem.

1           So both of those arguments are brand new as of  
2 December 29th. And I've done quite a bit of investigation on  
3 that and I just don't think that there's any merit to them.

4           So here is what we're looking at: The plaintiffs  
5 have asked Court to order a special election. If that occurs,  
6 then there's going to be within five weeks under the code a  
7 special election would have to be convened. Mr. Riddlemoser,  
8 who only has Stafford, which is just a fraction of House  
9 District 28. It's a large fraction but it's a fraction of  
10 House District 28. He informs me today that between military  
11 and other absentee balloters, just in Stafford County, he had  
12 1100 people. Well, he needs 45 days just to give them notice  
13 of absentee balloting under Virginia law and under the federal  
14 statute, which is called UOCAVA. He's required to do that.  
15 If he doesn't do it, then those absentee ballots get counted  
16 whenever they come in. Two weeks, three weeks, two months,  
17 three months, four months after the special election happens.  
18 So if we have that special election, how many of those voters  
19 are going to be disenfranchised?

20           THE COURT: Well, I appreciate your bringing to my  
21 attention the practical problems that may arise if I order a  
22 special election, but that isn't quite the issue today.

23           MR. MATHESON: Well, no, Your Honor only insofar as  
24 it affects the balance of the public interest in holding a  
25 special election. And I'll stop my analysis.

1 But this is my point: I mean the election has got  
2 to have a beginning and an end. And the record that the  
3 plaintiffs have shown at best shows that there were  
4 independent clerical errors that were made and clerical  
5 errors, which I do not think are unique to this jurisdiction,  
6 and we've seen no evidence to the contrary, that are unique to  
7 these two particular jurisdictions.

8 There were inadvertent clerical errors that were  
9 made, they were unknown on the day of the election. Now we  
10 know about them. Prospectively, do we need to go and fix  
11 those? Yes, we do. Does that warrant federal intervention in  
12 this local election? I believe under the authorities that  
13 have been briefed -- and I know I'm running out of time so I'm  
14 not going to delve into the case law, Your Honor --

15 THE COURT: You are, because I'm running out of  
16 time.

17 MR. MATHESON: That relief is unwarranted. So I  
18 appreciate your patience. Thank you, Your Honor. I yield the  
19 floor.

20 THE COURT: All right. I'm going to mark these two  
21 documents as Exhibits 1 and 2. But it will be for which  
22 party?

23 MR. MATHESON: For the registrars.

24 THE COURT: Registrar, et al parties.

25 All right. Who's next? Nobody else needs to be

1 heard?

2 MS. BIRKENHEIER: No, Your Honor.

3 MR. FLOOD: Your Honor, if I may be heard briefly.

4 THE COURT: Yes, you may.

5 MR. FLOOD: Emmett Flood for G. Paul Nardo, who is  
6 the clerk of House of Delegates.

7 THE COURT: All right.

8 MR. FLOOD: Mr. Nardo is -- has been made a  
9 defendant in the case and among the forms of relief sought by  
10 the plaintiffs. One, Your Honor is federal judicial  
11 intervention to stop Mr. Nardo from recognizing Mr. Thomas,  
12 the presumptive winner of District 28, and seating him in the  
13 House of Delegates come noon next week on the opening day of  
14 the session, January the 10th.

15 Of course plaintiffs have also sought relief in the  
16 form of an injunction to in effect nullify the election and  
17 have Your Honor order a new one.

18 Mr. Nardo is not a political actor here. He is an  
19 employee of the House of Delegates. He does not serve in that  
20 roll as a partisan Republican or Democrat. He is at pains, I  
21 think, to underscore for the Court that he takes no position  
22 on the due process or other questions presented by the  
23 plaintiffs as to whether a new election is called for. But  
24 precisely because he is an employee of the House of Delegates,  
25 he has in this case the interest that the House of Delegates,

1 which is part of the legislative branch in the Commonwealth  
2 has, when it comes to the question of whether a federal court  
3 should do something.

4 And the position we've taken in the brief is a  
5 simple one, and Mr. Nardo's view of that is, that if the Court  
6 finds that a remedy is needed here, it ought to suffice Mr.  
7 Nardo suggests, that the Court issue that remedy against the  
8 various election boards and not pursue anything against him in  
9 his official capacity as the clerk.

10 If Your Honor were to nullify the election or order  
11 a new one Mr. Nardo, who will sit in the chair, the Speaker's  
12 chair at the very beginning of the proceedings next week at  
13 noon -- if Your Honor nullifies the election, he will not  
14 recognize Mr. Thomas or anyone else because it is the historic  
15 practice, one that he intends to continue to represent on  
16 opening day, only that person who presents the appropriate  
17 credentials, which in this case is a certification that he is  
18 the victor in that race.

19 So if something happens, if Your Honor decides to do  
20 something about the election, he submits there's no need to do  
21 anything with him because he will not recognize anyone who  
22 does not have a certificate of election.

23 If Your Honor does not take action against -- to do,  
24 undo the election or order a new election, then it is his  
25 present expectation, consistent with historic practice, to

1 recognize Mr. Thomas today pending our finding something in  
2 the state precedence, in the legislative precedence that might  
3 change that. Otherwise that's his position and he asked that  
4 I communicate it to Your Honor.

5 THE COURT: Anyone else want to be heard?

6 MR. FLOOD: Thank you, Your Honor.

7 MS. BIRKENHEIER: Your Honor, we'd ask if we could  
8 be heard. But given the process you've outlined and the  
9 Court's familiarity with the pleadings, we don't feel that's  
10 necessary.

11 THE COURT: I'm sorry. I'm unable to hear you.  
12 Come to the podium, if you would, please.

13 Give us your name and the party you represent and  
14 tell me whatever you need to tell me.

15 MS. BIRKENHEIER: Certainly. My apologies, Your  
16 Honor. I am Anna Birkenheier on behalf of the Governor, the  
17 State Board of Elections and its members, the Department of  
18 Elections and Commissioner Edgardo Cortes.

19 I just wanted to indicate that while we had  
20 initially represented we would like to make argument, given  
21 the process that the Court has outlined and the Court's  
22 familiarity with the pleading, we are happy to rely on our  
23 filings unless there are any specific questions the Court may  
24 have for us.

25 THE COURT: Thank you. Anyone else?

1 MR. WARD: Good afternoon, Your Honor. Michael Ward  
2 for Doug Filler, Cathie Braman, and Aaron Markel. They're  
3 individual members of the electoral boards. They were sued in  
4 their official capacities. Your Honor, the only point that I  
5 would make is that I have just recently been retained to  
6 represent Ms. Cathie Braman. She signs onto the brief that I  
7 filed on behalf of Mr. Filler and Mr. Markel. And that's  
8 already in the file. She simply signs onto it. We took no  
9 position other than pointing out that in their official  
10 capacity there's no allegations that these three individuals  
11 did anything wrong themselves. But otherwise, as the state  
12 did, take no position on the motion sought.

13 THE COURT: Anyone else? All right. You have five  
14 minutes or less.

15 MR. SPIVA: Your Honor, I think it would be less.

16 I wanted to first just address the procedural issue,  
17 Your Honor. The documents that we filed with our reply brief,  
18 we didn't have any of those documents at the time we filed our  
19 initial brief. We got those mainly through FOIA requests  
20 after the time that we filed our brief. As Your Honor is  
21 aware --

22 THE COURT: You don't want me to ask you when did  
23 you get them.

24 MR. SPIVA: You know, I actually --

25 THE COURT: Why did you wait until last night.

1 Never mind, it happened. Don't do it in the future.

2 MR. SPIVA: Your Honor those documents we just got  
3 yesterday or maybe they were Wednesday.

4 MR. MARSHALL: Wednesday. Wednesday, filed on  
5 Thursday.

6 MR. SPIVA: Wednesday, filed on Thursday, Your  
7 Honor. I'm talking about the documents that we filed with the  
8 reply brief on the 29th, which is I think was causing the  
9 consternation and those documents we had gotten within a very  
10 short period of time before we filed that and it was certainly  
11 after we filed our initial --

12 THE COURT: Let me tell you this and we're not going  
13 to spend anymore time on it. In this court, if there's a  
14 briefing schedule, you must adhere to it or seek leave to  
15 deviate from it. In this instance, there was no firm briefing  
16 schedule, but there was a local rule. The local rule says you  
17 file, somebody gets 11 days to respond. What you should have  
18 done is said, Look, can I have leave to give you all of this  
19 stuff? And so do that in the future.

20 What else do you have?

21 MR. SPIVA: Yes, Your Honor. I do want to point out  
22 we did file a motion for leave and we had requested  
23 everybody's position.

24 THE COURT: Last night?

25 MR. SPIVA: No, Your Honor -- yesterday for the --

1 for the documents that we filed yesterday.

2 THE COURT: Yes.

3 MR. SPIVA: We asked for leave.

4 THE COURT: As a famous cartoon character says "too  
5 late."

6 MR. SPIVA: Understood, Your Honor.

7 THE COURT: Remember, I have to read all of this  
8 stuff and think about it.

9 MR. SPIVA: If we had them earlier --

10 THE COURT: Never mind. Just go on to whatever you  
11 want to say on the merits and let's be done with it.

12 MR. SPIVA: I think that I can be brief, Your Honor,  
13 that I think the major contention, I think, about the factual  
14 scenario here misunderstands the point that was made by the  
15 2015 and 2016 alerts, if you will, that some voters were  
16 misassigned. It wasn't to contend, because certainly we  
17 didn't have the discovery to know this as a fact that it was  
18 the same voters, but as the documents reflect, there were some  
19 voters, the minutes of their board meetings reflect this.  
20 There were some voters who were misassigned at the time and  
21 that had to be corrected.

22 That should have set off some type of alarm bell.  
23 It happened twice, at least twice. To do some further  
24 looking. Maybe perhaps of the nature of the looking that  
25 happened after this election. That only took a couple of days

1 to discover that 347 people had been misassigned. There  
2 weren't adequate procedures certainly at the local level and  
3 that's where, you know according to the Cortes declaration,  
4 that's where the information comes from to begin with, the  
5 assignments.

6           They go -- they then get put into the state system  
7 and there wasn't really much procedure to speak of at the  
8 state level either, Your Honor, because essentially the  
9 Department of Elections only provided assistance when  
10 requested by the localities. And that, of course, resulted in  
11 the number of people here that were disenfranchised.

12           The only other thing I will say, Your Honor, we  
13 heard a lot, I think, from the gentlemen who spoke earlier.  
14 And I need -- I have a cheat sheet, but I don't have an  
15 attorney cheat sheet, so one of my distinguished colleagues on  
16 the other side, talked about the fact that this was a small  
17 number or small percentage when you compare it to everybody on  
18 the voter rolls. Of course here, where you have first of all,  
19 about 11,000-some voters for each candidate, this is actually  
20 a quite substantial number and of course when you compare it  
21 to the margin, it could have made all the difference. So it's  
22 quite -- it's quite significant, Your Honor.

23           I don't really have much quarrel with my  
24 distinguished colleague's description of the cases that I  
25 cited. I think though that they confirmed that in each of

1 those cases, *Griffin* and *Ury* and Kaiser [sic] that these were  
2 inadvertent errors that resulted -- *Krieger* -- pardon me, Your  
3 Honor, these were inadvertent errors that resulted in a  
4 fundamental unfairness that the Court then decided that it had  
5 to step in and correct with the new election.

6 I'll close with this, Your Honor. You know, earlier  
7 this week, a different client of mine in a different district.  
8 I'm sorry, Your Honor, I should address one more thing,  
9 because my distinguished colleague mentioned another case --  
10 that case did not involve the issues in this case. They  
11 involved absentee ballots that were stuck at the post office.  
12 And so I didn't want Your Honor left with the impression that  
13 we had filed two cases in front of two different judges or  
14 something like that involving the same issues. That's not the  
15 case.

16 Going back to my closing point, Your Honor. You  
17 know in another district that ultimately was decided with a  
18 drawing -- I'm sure Your Honor has read about it -- although  
19 the Court in that case ruled against our client, you know, I  
20 was -- I found it quite moving that the Court noted that, you  
21 know, one vote, that there's been a heavy price paid for the  
22 right to vote. And that the Court would do everything it  
23 could to make sure that the will of the voters was heard. And  
24 here, too, Your Honor, you have in front of you 87 people who  
25 have been denied their right to participate in the election,

1 in the *Wesberry v. Sanders* words of the representatives who  
2 make the laws under which they must live. And so, Your Honor,  
3 should not seat someone who is not clear as the choice of the  
4 voters.

5 Your Honor, we would respectfully request that you  
6 require/order a new election.

7 THE COURT: All right. I'm going to recess briefly,  
8 consider the matter, and I'll let you have a decision shortly.

9 (Recess.)

10 THE COURT: All right. The matter is before the  
11 Court on a motion for a preliminary injunction. And let me  
12 say as a preface that I appreciate all of the arguments and  
13 the briefs. I have some -- I get a little bit irritated when  
14 things come in at the last minute, but you can understand  
15 that. On the other hand, I am fully aware of how important  
16 people think this is. All the litigants that appear before me  
17 think their case is very important. Whether it's an  
18 individual litigant in some civil case or a defendant. The  
19 case right before this was a young man looking at 32 years. I  
20 don't have any doubt that he thought that was pretty  
21 important. But, of course, I know that this is very important  
22 to the people in these districts in Fredericksburg. I'm quite  
23 aware of that. I simply say that every case that I hear is  
24 important to the litigants involved.

25 I understand that. That doesn't diminish in any way

1 how important I think it is to you all. But by the same token  
2 the fact that there are 50 people here doesn't move me. I  
3 know it's important.

4 Now the matter is before the Court on this motion  
5 for a preliminary injunction and the plaintiffs are four  
6 residents of Virginia House District 28 and they brought this  
7 suit claiming that their First and Fourteenth Amendment rights  
8 were infringed when poll workers mistakenly gave ballots for  
9 HD-88 to residents of HD-28 at the General Election in  
10 Virginia on November the 7th of this year -- of last year.  
11 Time flies. And it flies a lot more quickly at my age. I  
12 don't look back or forward anymore. I only reminisce.

13 Plaintiffs now seek a preliminary injunction  
14 ordering the officers of the Virginia State Board of Elections  
15 to vacate certification results for HD-28 barring the clerk of  
16 the House of Delegates from seating the winner, the certified  
17 winner of HD-28 and ordering a new election for HD-28.

18 All of the plaintiffs are -- well plaintiffs are all  
19 registered voters and residents of HD-28 in Virginia. Each of  
20 the plaintiffs voted in the November 7th General Election on  
21 election day. Three of the plaintiffs, Kenneth Lecky, Delores  
22 Lecky, and Phillip Ridderhof were given ballots for HD-88  
23 despite being residents of HD-28. Amy Ridderhof successfully  
24 voted in HD-28.

25 Defendants include a plethora of organizations and

1 individuals, but they include the Virginia State Board of  
2 Elections, which regulates Virginia elections and certifies  
3 the results of those elections. The Virginia Department of  
4 Elections, which implements election laws and regulations to  
5 support accurate, fair, and open secure elections. Stafford  
6 County Electoral Board which prepares ballot, administers  
7 absentee voting, conducts elections, ascertains results of  
8 elections in Stafford County, the City of Fredericksburg  
9 Electoral Board, which prepares ballots, administers absentee  
10 voting, conducts elections, ascertains results of elections in  
11 the City of Fredericksburg.

12           Now the individual defendants are sued in their  
13 official capacities and they include the members of the State  
14 Board. Messrs. Alcorn, McAllister, and Ms. Wheeler. Edgardo  
15 Cortes, Commissioner of the Department of the Virginia  
16 Department of Elections, and there's a list of others.  
17 Completed with Mr. Nardo, clerk of the House of Delegates. I  
18 heard from his representative today. And the form -- well, it  
19 is still the governor of Virginia, Governor McAuliffe is also  
20 named.

21           Now a brief summary of the voting procedures adds  
22 necessary context to the Court's analysis and ruling. Voting  
23 assignments in Virginia track the U.S. Census. Following  
24 publication of a census a general assembly redraws districts  
25 and assigns localities to each district based on federal and

1 constitutional restrictions.

2           Precincts may be wholly within a particular district  
3 or split to include voters -- to include voters from multiple  
4 districts. Precincts, of course, are entities established by  
5 localities. After new districts are finalized, 133 general  
6 registrars across Virginia manually assign addresses to  
7 districts in the Virginia Election and Registration  
8 Information System. It's called VERIS, a statewide database  
9 which contains voting data. And because road addresses do not  
10 follow locality and precinct boundaries used in the census,  
11 this process of assigning addresses to particular districts is  
12 not without significant complexity. Post office  
13 accommodations, homeowner petitions, and changes to street  
14 names further or can further complicate the process. People  
15 can ask: I don't like my number. Can I change my number?  
16 Can I put my post office box on the other side of the road?  
17 All of those things may operate to complicate things.

18           When an election occurs, the State Board provides  
19 VERIS data to polling locations so that poll workers can  
20 distribute the correct ballots to individual voters.

21           Now on April 11th -- I'm sorry, April 2011,  
22 following the 2010 Census, the General Assembly completed  
23 redistricting of all 100 House of Delegates seats. The  
24 resulting district map split Stafford County in the City of  
25 Fredericksburg between HD-28 and HD-88. Stafford County also

1 contained precincts within HD-2.

2 Specifically using the precincts in existence, as of  
3 April 1, 2011, the General Assembly assigned 12 full precincts  
4 and part of another precinct in Stafford County and two full  
5 precincts and a part of another precinct in the City of  
6 Fredericksburg. That's part of the Virginia code. And  
7 general registrars statewide then updated the addresses  
8 assigned to each district in VERIS accounting for changes to  
9 the boundaries.

10 Several months after 2011 redistricting, the City of  
11 Fredericksburg redrew its precinct lines and as a result  
12 several precincts not formally split between HD-28 and HD-88  
13 became split between the Districts, meaning the voters in the  
14 same precinct were located in different House Districts.  
15 Different voters of the voting place would have different  
16 ballots from voters voting in the polling booths next to them  
17 depending on -- depending not on current precinct lines, but  
18 on what the precinct lines were previously in the 2010 Census  
19 report.

20 Now the General Election for the House of Delegates  
21 occurred, as I said, on November 7, and on that day the  
22 plaintiffs went to their respective polling locations to  
23 attempt to vote in the HD-28 race between Cole and Thomas.  
24 And as I said, Amy Ridderhof successfully voted in HD-28.  
25 Phillip Ridderhof, despite being correctly assigned in the

1 VERIS database as the voter in HD-28, received a ballot for  
2 HD-88 due to a poll worker's error. Kenneth Lecky and D.D.  
3 Lecky were given ballots for HD-88 because the VERIS database  
4 incorrectly reflected their addresses as falling within HD-88  
5 and not HD-28.

6           When poll workers gave Lecky a ballot for HD-88, she  
7 told the poll workers she believed she should have been  
8 assigned or she should have been registered to vote in HD-28.  
9 And after she voted, Lecky raised her concern again to two  
10 board members, Rodriguez and Markel, who directed her to the  
11 map of the House District. When the map suggested that she  
12 had been assigned to the wrong district, the board members  
13 determined that the map was incorrect and removed it from the  
14 polling place. In other words, they elected to rely on the  
15 VERIS data. The election official also denied provisional  
16 ballots to the affected voters on the day of the election  
17 based on their determination that the VERIS database was  
18 entitled to a presumption of validity. And if the database  
19 were incorrect, the voters could pursue state mechanisms to  
20 challenge it.

21           I'll have something more to say about provisional  
22 ballots in a moment.

23           So, the complaints prompted the Department to  
24 investigate the reasons for and the extent of the  
25 irregularities and on November 27th, the Department issued a

1 summary of the findings of the investigation. And these  
2 findings included that 260 voters were incorrectly listed in  
3 the VERIS database as residing in HD-2 or HD-88 rather than  
4 HD-28. But only 86 of the 260 voted in the November 7  
5 election. 124 voters who were not residents of HD-28 were  
6 incorrectly listed as residents of HD-28. And 61 of these 124  
7 voted in the November 7 election. Of course, we don't know  
8 how they voted.

9           So in total, a number 300 were -- and some, were  
10 incorrectly listed in the VERIS database. 147 of those of  
11 whom voted. The State Board certified the results of the  
12 election in HD-28 with Thomas receiving 11,842 votes and Cole  
13 receiving 11,760, a margin of victory of 82 votes.

14           A later recount requested by the losing candidate  
15 Cole confirmed that Thomas was the winner of the election but  
16 by reduced margin of victory of 73 votes. Then plaintiff  
17 brought this suit, pursuant to Section 1983 alleging  
18 violations of their First and Fourteenth Amendment rights and  
19 seeking a temporary restraining order to enjoin the Department  
20 from certifying the results of the HD-28 election.

21           And I held a hearing on December 6, 2017, after a  
22 hearing the request for a TRO was denied for the reasons I  
23 stated then and there's an order as well. And I also noted  
24 thereafter, I issued an order to show cause why the complaint  
25 should not be dismissed as being moot because the only -- the

1 only remedy sought was related to the -- what was in the TRO.  
2 But, of course, I gave the plaintiffs leave to file an amended  
3 complaint, which they did. And filing today or -- the motion  
4 for a preliminary injunction, which I am reviewing today and  
5 ruling on today.

6 And the amended complaint alleges that the errors in  
7 House District assignments were the result of "defendants  
8 employing inadequate safeguards, including allocating  
9 insufficient resources against erroneous deprivations of the  
10 right to vote."

11 The amended complaint further alleges that the --  
12 that administrators of this election knew or had reason to  
13 know that significant numbers of registered voters were  
14 incorrectly assigned to House Districts well before the 2017  
15 election. There's some detail there that I don't think I need  
16 to go into, but. And the allegation is that other election  
17 officials in Fredericksburg and the Department knew about the  
18 incorrect assignments no later than 11 a.m. on election day.  
19 So the amended complaint says there's a denial of the right to  
20 vote in violation of substantive due process, a denial of the  
21 right to vote in violation of procedural due process, undue  
22 burden on the right to vote in violation of the First  
23 Amendment and the equal protection clause of the Fourteenth  
24 Amendment and disparate treatment of voters in violation of  
25 the equal protection clause and simply disparate treatment.

1           Well, the standard for issuance of preliminary  
2 injunction is too well settled to require extended discussion.  
3 A party seeking a preliminary injunction must demonstrate that  
4 that party is likely to succeed on the merits, that that party  
5 is likely to suffer irreparable harm in the absence of  
6 preliminary relief, and that the balance of equities tips in  
7 that party's favor, and that an injunction is in the public  
8 interest.

9           Now the *Winter* case in the Supreme Court is the best  
10 authority for that. And if you're as old as I am you know  
11 that *Winter* altered long-standing Virginia law that went back  
12 to, at least the '60s. Making the standard a little more  
13 rigorous. No sliding scales or anything of that sort.

14           So the Fourth Circuit has, in applying *Winter*, made  
15 clear that the movement -- I'm sorry, that the movant need not  
16 show a certainty of success, but the movant must make a,  
17 quote, clear showing, closed quotes, of likelihood of success  
18 on the merits. And that's from the *Pashby* case at 709 F.3d.

19           So we begin with an analysis of the various factors  
20 to be considered for a preliminary injunction. We begin with  
21 whether the plaintiffs have made a requisite clear showing of  
22 likely success on the merits.

23           Now the Supreme Court has made clear that the first  
24 inquiry in any suit under 1983 is whether the plaintiff has  
25 been deprived of the rights secured by the constitution and

1 the laws. And in the context of state or local election  
2 irregularities, the Fourth Circuit has also made clear that  
3 whether the irregularity amounts to a constitutional claim,  
4 depends on its severity, whether it was intentional or more of  
5 a negligent failure to carry out properly state election  
6 procedures and whether it erodes a democratic process. That's  
7 from the *Hendon* case, which we've heard reference to tonight,  
8 and I'll say more about in a minute.

9           Importantly, Fourth Circuit precedent also requires  
10 courts considering these claims to pay mind to the functional  
11 structure embodied in the Constitution. The nature of the  
12 federal court system and the limitations inherent in the  
13 concepts of both -- the concepts both of limited federal  
14 jurisdiction and the remedy afforded.

15           In other words, it is important for federal courts  
16 to be exquisitely sensitive to interfering in state matters.  
17 I think I've stated that a little too broadly. But  
18 essentially it means that federal courts should be very  
19 sensitive to that.

20           Now the plaintiffs in this case argue they were  
21 denied their right to vote in HD-28 or had their votes diluted  
22 in violation of the due process or equal protection clauses of  
23 the Fourteenth Amendment.

24           As an initial matter, it's not entirely clear  
25 whether there is a federal constitutional right to vote in a

1 particular district. The districts are assigned by the  
2 General Assembly and federal law appears to be essentially  
3 agnostic on the question of which ballot a voter is given.  
4 But with that said, the Supreme Court has also made clear that  
5 a citizen has a constitutionally protected right to  
6 participate in elections on an equal basis with other citizens  
7 in the jurisdiction.

8           So I'm going to proceed on the assumption that there  
9 is a constitutional right that is involved -- that could be  
10 involved in voting in a particular district. That doesn't  
11 mean I have decided this matter by any means.

12           Now with respect to the plaintiffs' substantive due  
13 process claims or arguments, courts in this circuit and  
14 elsewhere have uniformly distinguished between patent or  
15 patent and fundamental and broad-gauged unfairness that erodes  
16 the democratic process and garden-variety election  
17 irregularities that do not give rise to a due process claim  
18 under Section 1983. Numerous cases so hold, including  
19 *Hutchinson*, which we've discussed here this evening.

20           So if we look at the cases, it's not surprising that  
21 one side or the other picks cases that they believe reflect  
22 something close to what happened and either characterizes it  
23 as broad-gauged or not. So if we look at that, the *Griffin*  
24 case points out that cases justifying federal intervention  
25 have involved attacks upon the fairness of the official terms

1 and procedures under which elections were conducted and have  
2 not required the federal court to enter into the details of  
3 the administration of the election.

4           Specifically, courts have found that the total  
5 abrogation of a statutorily mandated special election --  
6 that's the *Welch* case in the Fifth Circuit -- the widespread  
7 retroactive invalidation of the absentee and shut-in ballots  
8 cast by voters relying on official inducements -- that's the  
9 *Griffin* case -- the systematic lack of uniform rules and  
10 standards and procedures leading to failures in registration,  
11 voting machine allocation, and poll worker training over the  
12 course of 30 years and several elections -- that's all the  
13 *League of Women Voters* against *Brunner* -- and last minute  
14 consolidation of precincts resulting in hours long waiting  
15 times all -- that resulted in large numbers of people not  
16 being able to vote at all, all amount to the kind of  
17 broad-gauged unfairness that renders an election patently and  
18 fundamentally unfair.

19           Now, on the other hand, the inaccurate tabulation of  
20 votes stemming from malfunctioning electronic voting devices  
21 -- that's the *Shannon* case and the *Hennings* against *Grafton*  
22 case and the *White-Battle* case -- the dilution of illegal  
23 votes caused by election officials permitting non-democrats to  
24 vote in a democratic primary -- that's the *Powell* case in the  
25 Second Circuit -- the mistaken use of wrong district map in

1 assigning voters -- that's the -- that's the *Harris City*  
2 *Department of Education* against *Harris City, Texas* -- and the  
3 inadvertent printing of ballots that fail to comply with the  
4 statutory requirement -- that's the *Hendon* case -- have all  
5 been deemed to be garden-variety irregularities insufficient  
6 to state a due process claim.

7 In my view, and I recognize that it's a judgment.  
8 This will come as no surprise to all of you, that's what I do.  
9 That's what judges do. They make judgments.

10 In my judgment, plaintiffs have not made the  
11 requisite clear showing that the assignment of voters to  
12 incorrect House Districts and the distribution of ballots  
13 associated with those incorrect House Districts amounts to the  
14 kind of broad-gauged unfairness necessary to state a due  
15 process claim.

16 Rather, as in the *Shannon, Hennings, Powell, Harris*  
17 and *Hendon* cases, the allegations in the amended complaint  
18 attribute those election or these election irregularities  
19 largely to innocent human or mechanical error in entering the  
20 addresses assigned to each precinct and at most negligence on  
21 the part of election officials in failing to take steps to  
22 correct those errors. So that's important what I've just  
23 said. What I've just said is I think that at most -- at most  
24 there -- there are some negligent errors in failing to make  
25 these corrections.

1 I don't think there is any evidence or claim that  
2 there was any great conspiracy to dilute these votes in HD-28  
3 or to do anything else nefarious. Certainly no evidence of  
4 that is shown. Some evidence was adduced last night that  
5 these things were talked about. And today I heard from a  
6 response saying they aren't the same as the issues that are  
7 being raised today. I'm not entirely clear. I'm going to  
8 look more closely at that, because I'm going to write an  
9 opinion about this, but I don't see that as the same. I think  
10 these officials acted reasonably in these circumstances. I'll  
11 say more about that in a minute. That doesn't mean that I  
12 think they reached the right result. But I think they acted  
13 reasonably and without any intent or discriminatory animus or  
14 anything else.

15 (Discussion off the record.)

16 THE COURT: Now I think the -- as in *Shannon*,  
17 *Hennings*, *Powell*, *Harris*, and *Hendon* the allegations in the  
18 amended complaint, I think, attribute the election  
19 irregularities, I think here, largely to innocent human or  
20 mechanical error in entering the addresses assigned to each  
21 precinct or negligence on the part of election officials in  
22 failing to take prompt steps to correct those errors.

23 Now the election officials' failure to offer  
24 provisional ballots to affected voters on election day, in my  
25 view, does not arise to a due process violation.

1           If you think about it a minute, the statute on  
2 provisional ballots you have to show up and you have to file  
3 an affidavit that says you're entitled to vote in that  
4 district and then you get only one ballot. What you can't do  
5 is give ballots for somebody in HD-28 and then they get a  
6 ballot in HD-88 and they go and vote. Because you can't ever  
7 count -- you can't ever keep them out. There might be a way  
8 to do it, but I think the officials in these circumstances  
9 made a reasonable decision to rely on the data that they had,  
10 the VERIS data that they had, in their determinations. And I  
11 don't find that is sufficient to trigger the broad-gauged,  
12 patent, and fundamental unfairness that erodes the democratic  
13 process, that would be -- that would be necessary to state a  
14 due process claim.

15           Now in *Hendon* plaintiff voters brought equal  
16 protection and due process claims alleging that their right to  
17 vote was violated when the ballots in the General Election  
18 failed to comply with the technical requirements of a North  
19 Carolina statute. Although the Fourth Circuit acknowledged  
20 the failure of the ballots to comply fully with statutory  
21 requirements, the Fourth Circuit there found that that failure  
22 does not constitute a violation of the due process clause,  
23 because there's no indication that the failure was other than  
24 simple negligence on the part of election officials.

25           So, as in *Hendon*, even assuming the failure of

1 election officials to provide provisional ballots, which I  
2 don't think was a violation of Virginia law, but I think that  
3 there is no persuasive indication or evidence that the failure  
4 was other than simple negligence on the part of election  
5 officials.

6           So in sum, because allegations suggest that the  
7 errors were, in my view, no more than garden-variety  
8 irregularities, that doesn't mean that it isn't important to  
9 those people whose votes should have been counted in HD-28 or  
10 HD-88 and were not that it's not a big deal to them. Of  
11 course I understand it's a big deal. But it's -- there are  
12 other big deals here like federal courts sticking their noses  
13 into state election procedures, which may have to happen. If  
14 I go on and hear this case and I hear more evidence and I make  
15 appropriate findings, I could order a new election. But it's  
16 going to take much, much more than I've seen before today.  
17 And I indicated that during the TRO. I think to some extent  
18 the plaintiffs recognized that I am not an enthusiastic -- not  
19 enthusiastic about interfering in state elections and that I  
20 hope the General Assembly would take care of it. Well, that  
21 wasn't a path that was chosen. And I understand that. Who  
22 knows what I would have done if I had been a lawyer in this  
23 case. I might have made the same choice.

24           But in any event, I did make my preference for state  
25 remedy for this problem known. In any event, as I said the

1 allegations here and the evidence that has been presented  
2 suggest the errors here were no more than garden-variety  
3 irregularities and I don't believe the plaintiffs have made  
4 the requisite clear showing of likely success on their  
5 substantive due process claim.

6           The procedural due process claim or argument  
7 similarly fails. Put simply, the plaintiffs have failed to  
8 allege as sufficiently constitutionally protected a sufficient  
9 constitutionally protected interest. For example, in the  
10 *Brunner* case, the Sixth Circuit considered a similar  
11 procedural due process claim, namely the -- that failures of  
12 election procedures deprive voters of their liberty interest  
13 in voting without adequate pre or post deprivation process.

14           The *Brunner* court recognized that even though the  
15 voting system in that case impinged on fundamental right to  
16 vote, plaintiffs nonetheless had failed to allege a  
17 constitutionally protected interest. The plaintiffs here  
18 point to no authority actually supporting the existence of a  
19 procedural due process claim. Indeed, the only voting case  
20 they cite in this section of their brief, *Bush* against Gore  
21 and *Hunter* against *Hamilton City* involved a substantive due  
22 process, an equal protection claim, not a procedural due  
23 process claim. So in my view, the plaintiffs here have not  
24 made the requisite clear showing that they're likely to  
25 succeed on the merits of their procedural due process claim.

1           Now finally, with respect -- well not quite finally.  
2     Let me mention, there was something said about the *Krieger*  
3     case. That was a case in which two rounds of ballots were  
4     misprinted and a third correct ballot was sent out even though  
5     the state election officials decided to count the first two  
6     sets of ballots or first set of ballots where one of the  
7     candidates was not even identified. The Court determined that  
8     this was a broad-gauged unfairness because the election  
9     officials made the decision to count hundreds of ballots that  
10    did not list all of the qualified candidates. In my view  
11    that's very different from this case.

12           In addition, also cited in the course of argument,  
13    was the *Bennett* case. This falls on the other side. There  
14    the Ninth Circuit held that a Hawaii Supreme Court  
15    interpretation of a state law resulting in the counting of an  
16    additional 45,000 ballots as cast ballots within the meaning  
17    of the state constitution was not a fundamentally unfair  
18    abridgment of the right to vote. Although, the state election  
19    commission had informed voters before the election that  
20    abstention ballots -- and that's what happened, they didn't  
21    put in their vote, they just left it blank -- that abstention  
22    ballots would not count towards the total number of ballots  
23    cast, that fact did not persuade the Ninth Circuit that the  
24    Hawaii Supreme Court had violated the substantive due process  
25    rights of Hawaii voters by choosing to interpret the Hawaii

1 Constitution differently.

2           So importantly, the Ninth Circuit noted that the  
3 state -- the states have the right to determine their own  
4 election rules. And that's true here as well. There's  
5 actually a good deal more law about that that I don't have the  
6 time to get into, but I do think it's important to reference  
7 that.

8           In the -- so let me proceed. I think the plaintiffs  
9 have failed to make a clear showing of likelihood of success  
10 on the merits with respect to their equal protection claims.  
11 They argue that *Anderson-Burdick* framework applies. And under  
12 that framework any interest in Virginia, any interest Virginia  
13 might have in differentiating between the residents of HD-28  
14 does not outweigh the severe deprivation associated with a  
15 denial of the right to vote. But it's not clear that  
16 *Anderson-Burdick* line of cases even applies here. In fact, I  
17 don't believe it does.

18           In *Anderson-Burdick* and their progeny courts have  
19 considered the constitutionality of state statutes,  
20 regulations, or policies that burden the right to vote, not  
21 accidental mistakes on the part of election officials in  
22 administering an election. To hold otherwise would  
23 effectively transform any inadvertent error in the  
24 administration of state elections into a federal equal  
25 protection violation and I don't think the law supports such a

1 conclusion.

2           Here the plaintiffs do not allege that the incorrect  
3 assignments of voters was the result of a state policy or a  
4 state regulation or statute. Rather, plaintiffs identified a  
5 series of mistakes and corresponding failures to take  
6 corrective action. And there was, I think, this late admitted  
7 evidence that was brought to my attention is meant to show  
8 that it was ongoing for a long time. But I heard today, from  
9 one of the advocates, that those are different. Of course I  
10 will look more carefully at that in the future, but for now  
11 I'm not persuaded. The only policy plaintiffs identify is the  
12 local election officials' decision not to provide provisional  
13 ballots to voters who identified themselves as assigned to the  
14 incorrect district on election day. And they say allegedly  
15 that's in violation of Virginia law. I don't agree with that  
16 being in violation of Virginia law.

17           I think if we look at the text of Virginia Code  
18 24.2-653A -- I think what the statute is focussing on is on  
19 people who are not permitted to vote because they don't appear  
20 to be registered and they file an affidavit, they're given a  
21 provisional ballot. As I said the problem with someone who  
22 says that I'm supposed to vote in HD-28, you've given me a  
23 vote -- a ballot for HD-88, that can't be remedied on the spot  
24 with a provisional ballot. I suppose what could have happened  
25 -- but there's no precedent for it -- is that they could have

1 given someone both ballots, put them away, figured out the  
2 right, and then counted them. They could have done that. I  
3 don't believe the federal constitution requires that. I think  
4 they were reasonable in relying on VERIS as it existed.

5 Now so the Seventh Circuit in *Hennings* considered a  
6 similar claim, namely the failure of election officials to  
7 provide substitute paper ballots when voting machines  
8 malfunctioned in violation of state law. They said that was a  
9 violation of state law. That wasn't sufficient to raise an  
10 equal protection claim because the mere violation of a state  
11 statute by an election official will not give rise to a  
12 constitutional claim and an action under Section 1983. That  
13 is *Hennings* quoting *Snowden* against *Hughes* in the Supreme  
14 Court.

15 So in my view, at this point, plaintiffs have not  
16 made clear that the *Anderson-Burdick* framework applies here.  
17 Plaintiffs also allege that election officials violated the  
18 equal protection clause by providing some HD-28 voters with  
19 correct ballots and others with incorrect ballots. Plaintiffs  
20 contend that this disparate treatment of voters living in the  
21 same district was arbitrary and thus amounts to an equal  
22 protection violation.

23 And the Supreme Court has noted that generally  
24 uneven or erroneous application of an otherwise valid statute  
25 may constitute denial of equal protection, but only if it

1 represents intentional or purposeful discrimination. That's  
2 the *Snowden* case in 321 U.S.

3           Importantly, in the voting contest, the Supreme  
4 Court has more recently recognized that arbitrary treatment in  
5 some circumstances can also result in equal protection  
6 violation, even where it is not intentionally discriminatory.  
7 That's *Bush* against *Gore*, which once it was issued was said  
8 don't rely on this for anything in the future.

9           Neither of these factors, neither arbitrary or  
10 intentional discrimination, exists here. To begin with, as  
11 I've mentioned before, the amended complaint contains no  
12 allegations nor has any evidence been presented that any  
13 individual or that any invidious or intentional discriminatory  
14 behavior exists on the part of the election officials.

15           At most, the amended complaint discloses negligence  
16 on the part of registrar employees in entering information and  
17 negligence on the part -- perhaps on the part of election  
18 officials in failing to correct mistakes once they became  
19 aware of them.

20           In *Gamza*, an error in setting up matrices on voting  
21 machines meant that many votes for one candidate were  
22 erroneously assigned to a different candidate. There, the  
23 Fifth Circuit concluded that the error did not constitute  
24 denial of equal protection of the laws because there was no  
25 evidence that the initial error in setting up the matrices and

1 the subsequent miscount of the ballots resulted from anything  
2 other than entirely innocent human error. Now that's *Gamza* at  
3 619 F.2d at 452.

4 Nor, in my view, have plaintiffs made a clear  
5 showing that the election officials subjected voters to  
6 arbitrary distinctions. Courts have generally found equal  
7 protection violations where a lack of uniform standards and  
8 procedures results in arbitrary and disparate treatment of  
9 different voters. *Bush* against *Gore*, for example, in the  
10 recounts. Similarly the Sixth Circuit in *Brunner* found that  
11 the facts in the complaint adequately alleged an equal  
12 protection violation because nonuniform rules, standards, and  
13 procedures for elections in Ohio had resulted in massive  
14 disenfranchisement and unreasonable dilution of the vote,  
15 depending on a voter's residence.

16 So by contrast, that's -- this case is quite  
17 different. The amended complaint here does not allege that a  
18 lack of uniform or specific standards and procedures  
19 contributed to the erroneous assignment of voters to House  
20 Districts. Instead, the complaint alleges that the election  
21 irregularities resulted from mere human error in failing to  
22 assign addresses to the right location and negligent in  
23 failing to correct fully the errors once election officials  
24 learned of the possibility of incorrect assignments.

25 Plaintiffs do not argue that the procedures for

1 assigning localities are not uniform or that the voters were  
2 treated differently once they informed poll workers that they  
3 believed themselves assigned to a different district. So,  
4 it's far from clear that plaintiffs are likely to succeed on  
5 their claim that state officials imposed distinctions so  
6 arbitrary as to amount to equal protection violations.

7           Now with respect to the issue of irreparable harm,  
8 plaintiffs essentially contend that any deprivation of a  
9 constitutional right automatically constitutes irreparable  
10 harm. This ignores an important part of the analysis courts  
11 must conduct. And let me be clear, having found that there's  
12 not a clear showing of success on the merits, there is no  
13 obligation to go on to the other factors. But I do so anyway.  
14 You spilled a lot of ink and so I'm going to do it.

15           As I've said, any deprivation of a constitutional  
16 right automatically constitutes irreparable harm ignores an  
17 important part of the analysis the Courts must conduct in  
18 considering whether to grant a preliminary injunction.  
19 Namely, whether a party is likely to suffer irreparable harm.  
20 In this case, assuming these plaintiffs were denied the right  
21 to vote in HD-28 in the November 7th, '11 -- November 7th  
22 election, that irreparable harm has already occurred. The  
23 important question is thus whether additional irreparable  
24 harm, if preliminary relief is not granted, occurs. And their  
25 reply in support of their motion for preliminary injunction,

1 plaintiffs suggest that important House of Delegates business  
2 takes place in the first month of a session.

3 Yes, I won't quarrel with that. I suppose some  
4 people might quarrel with the notion that important work takes  
5 place there. Brings back memories. Back in the late '60s,  
6 early '70s I participated in trying to get a bunch of law  
7 changes for the procedural code and so I appeared numerous  
8 times, worked with committees, and worked with changing the  
9 statute and the most I can say that if you're going to be a  
10 legislator you should have very, very long patience. And  
11 you've got to be prepared to tolerate a lot of foolishness.

12 In any event, that's irrelevant.

13 So in their reply brief, as I pointed out,  
14 plaintiffs suggest that the House of Delegates business in the  
15 first few weeks is very important. And I take that point.  
16 That's a fair point. Namely, the Speaker is chosen and  
17 committee assignments are selected.

18 Plaintiffs allege that this process affects many of  
19 the bills and will be considered in the session in how votes  
20 occur and suggests that this -- that this cannot later be  
21 repaired. But at the same time, Thomas can be removed from  
22 his office if a new election is ordered and if Joshua Cole  
23 prevails.

24 As such, some of the harm can later be remedied.  
25 Not all of it. I think there is some -- some strength to the

1 claim that there is irreparable harm. But as I said, that  
2 becomes irrelevant if there's no clear showing of likelihood  
3 of success on the merits.

4           Next is the balance of equities whether the public  
5 interest weighs in favor of plaintiff -- plaintiffs. To be  
6 sure, the right of suffrage is a fundamental matter. No doubt  
7 about that. But the Fourth Circuit has emphasized the  
8 importance of considering, in these cases, the functional  
9 structure embodied in the constitution, the nature of the  
10 federal court systems, and the limitations inherent in the  
11 concepts of both limited federal jurisdiction, and of the  
12 remedy afforded by Section 1983. That is, as I mentioned, is  
13 from *Hutchinson* and *Gamza*.

14           In this case, the structure of the constitution and  
15 the nature of the federal court system weigh somewhat in favor  
16 of the defendants. As the Fourth Circuit recognized in  
17 *Hutchinson*, which is a case more -- which is a case that has  
18 been much discussed here -- the constitution anticipates --  
19 this is *Hutchinson* -- anticipates that the electoral process  
20 is to be largely controlled by the states and reviewed by the  
21 legislature. And the Supreme Court has made clear that the  
22 states undoubtedly retained primary authority to regulate the  
23 elections of their own officials. That goes back almost a  
24 century.

25           Virginia here has done its job of ensuring due

1 process by providing numerous avenues by which to challenge  
2 election results, including recounts and election contests in  
3 the House of Delegates and others. Intervention of a federal  
4 court into the details of this election would be, on this  
5 record, would be inconsistent with proper respect for the role  
6 of others whose job it is to canvass the returns and declare  
7 the prevailing party. And the granting of an injunction might  
8 also provide incentives for candidates and voters to ignore  
9 principal roots established to challenge an election.

10           The Supreme Court has noted that federal voiding of  
11 a state election is "drastic." That's the word in *Bell*  
12 against *Southwell* is "drastic" if not staggering remedy. And  
13 as such it is a form of relief to be guardedly exercised.

14           So a federal court must exercise caution before  
15 interfering in a state election, particularly on a threshold  
16 motion before all facts have been developed. Although a great  
17 many have been developed.

18           So, in conclusion, plaintiffs have not made a clear  
19 showing that they are likely to success on the merits of their  
20 claims under the due process or equal protection clause, nor  
21 have they shown that the balance of hardships and public  
22 interest favor an injunction. So I'm denying the motion for a  
23 preliminary injunction.

24           But having said that, let me be clear, if the facts  
25 were different I wouldn't hesitate to call for a new election.

1 If there were large groups of people, obviously if they were  
2 denied the right to vote because of their ethnicity or for  
3 some other reason, that would fall on the other side of the  
4 *Hutchinson* line. But in this case, I come back to saying that  
5 it's my judgment at this time, on this record, that there is  
6 no clear showing of likelihood of success on the merits to  
7 warrant a preliminary injunction. And I say that fully  
8 cognizant of the argument made by the plaintiffs that  
9 important things happen in the early part of the General  
10 Assembly.

11 Now having denied the motion for a preliminary  
12 injunction, the next thing that ought to happen in this  
13 litigation is parties ought to file their motions to dismiss,  
14 if you intend to. We have a lot of defendants in this case  
15 that I think perhaps have no business in the case. But I may  
16 be wrong. And I'm prepared to reconsider that, but I want  
17 motions to dismiss, if you feel your client is entitled to  
18 one, to be filed promptly. And so that we can resolve that  
19 and determine whether this case goes on or not. I will issue  
20 an opinion that sets out what I have said tonight and more.  
21 So the parties will have that.

22 Now I appreciate your patience. I know that my  
23 ruling is disappointing to a large number of you, but the one  
24 thing you -- I hope you cannot be disappointed is I have not  
25 ignored your claims. I have not failed to pay attention to

1    them and failed to consider the authorities you've cited.

2    That doesn't mean I know I'm right.  What it means is I've  
3    done the best I could and I think I'm right and that's what I  
4    do.

5               And I also want to thank counsel for your briefs and  
6    your arguments.  They were helpful and interesting.  There's  
7    not a lot of law in this area of this kind of irregularity,  
8    this kind of situation.  But I think this case will be helpful  
9    to voting officials around Virginia to make sure they have  
10   things as up-to-date and as correct as they can.

11              Thank you for your patience.  Court stands in recess  
12   until Monday.

13  
14                   **(Proceedings adjourned at 7:49 p.m.)**  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motion for Preliminary Injunction in the case of the **KENNETH J. LECKY, et al versus VIRGINIA STATE BOARD of ELECTIONS, et al**, Criminal Action Number 1:17-CV-1336, in said court on the 5th day of January, 2018.

I further certify that the foregoing 74 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the January 7, 2018.



---

Tonia M. Harris, RPR  
Official Court Reporter